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IN THE

Supreme Court of the United States

October Term, 1970

No. 642

ALBERT MENGARELLI,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1970

No. .....

ALBERT MENGARELLI,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Albert Mengarelli petitions for a writ of certiorari to review the judgment of The United States Court of Appeals for The Ninth Circuit in this case, entered on May 12, 1970.

Opinion Below

The opinion of the Court of Appeals (App. pp. 1a-8a, *infra*) is not yet reported.

Jurisdiction

The opinion and judgment of the Court of Appeals was entered on May 12, 1970, and on July 9, 1970, the Court of Appeals denied a timely petition for rehearing (App. p. 2a, *infra*). On July 30, 1970, Mr. Justice Douglas extended the time for filing a petition for certiorari to and including September 4, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether an employee can validly consent to the search and seizure of the contents of a box belonging to his employer which is stored in the employee's home?

2. Whether a party who asserts his Fifth Amendment rights in response to questioning by federal agents and who is then taken to his home by two armed agents can be said to have "voluntarily consented" to a search and seizure at his home?

Constitutional Provision Involved

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement

After a jury trial in the United States District Court for the District of Nevada, petitioner was convicted on a one count indictment charging him with participating in a conspiracy to evade the payment of a substantial part of the 10% excise tax due and owing on wagers accepted at the Rendezvous Race and Sports Book in Las Vegas, Nevada, a business which he operated with his partner Keith Richards.

The government's evidence consisted almost exclusively of the testimony of agents of the Internal Revenue Service concerning their observations of the operations at the Rendezvous Race and Sports Book, as well as, their identification and analysis of certain Rendezvous records which they had seized.

According to these agents, wagers were accepted at the Rendezvous in either of two forms. Tourists and other casual customers of the Rendezvous placed their bets by orally giving the information to a clerk who would write this information on a printed ticket, date and time stamp the ticket, return a carbon copy to the customer and collect from the customer the amount of the wager plus the 10% excise tax. Certain regular customers followed a different procedure; they simply wrote out their bets on white slips of paper, which were readily available on the premises, and gave these white slips of paper together with the money for their bet to one of the Rendezvous employees.

It was the government's theory that the 10% excise tax was not paid on the wagers which were placed by the regular customers on the white slips. To support this theory, the government introduced charts showing that

during the period April 1965 through January 1966 the total amount of wagers reported to Internal Revenue was almost identical with the total amount of wagers reflected on the Rendezvous' printed tickets for the same periods. In addition, the government introduced a chart showing that during the week of February 12-18, 1966, the total amount of bets placed on white slips was $70,762* and the total amount placed on printed slips was $14,067.

Among the records used in compiling the chart relating to the week of February 12-18 was a box of wagering slips belonging to petitioner and his partner which had been seized without a warrant from the home of one of petitioner's employees where they were stored. The agent who seized these records testified that in the course of executing a search warrant at the Rendezvous Race and Sports Book on February 19, 1966, he attempted to question one of petitioner's employees, Harold Kline, but Kline refused to answer some of the agent's questions on the ground that the answers might tend to incriminate him. Two armed agents then accompanied Mr. Kline to his house where they seized and removed a box containing records belonging to petitioner and his partner. The agent admitted that at the time he seized these records he knew they belonged to petitioner and his partner, and that Kline had no proprietary interest in the records. The agent also testified that he had no idea whether Kline was authorized to release these records. The trial court admitted these records into evidence over defense counsel's objection that the search and seizure were illegal because Kline did not have authority to consent to the seizure and, in any event, Kline had not voluntarily consented to the search and seizure.

* The government did not claim that the white slip bets for this period were not reported to Internal Revenue.

Reasons for Granting the Writ

In *Chimel* v. *California*, 395 U.S. 752, the Court curtailed substantially the power of law enforcement officers to search without a warrant on the theory that the search was "incidental" to an arrest. There now remains only one major area in which law enforcement officers can engage in extensive searches without a warrant, that is, where there is a "consent" to the search. Whereas before *Chimel* law enforcement officials relied on "incidental searches" to justify proceeding without a warrant, it is not unreasonable to assume that in the wake of *Chimel* there will be an increase in the already substantial number of cases in which there is a claim that the search was preceded by "consent".

This case presents two important issues relating to the constitutionality of "consent" searches on which there is a conflict among the circuit courts which should be resolved by this Court. The first concerns the ability of a third party to waive the rights of a criminal suspect by consenting to a search and seizure of the suspect's property. The second relates to the standards to be applied to determine whether a consent was truly voluntary.

I.

In *Stoner* v. *California*, 376 U.S. 483, this Court rejected an argument that a hotel clerk could validly consent to the search of the defendant's hotel room stating, *id.* at 488:

> "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority'."

See also *Chapman* v. *United States*, 365 U.S. 610.

Despite this pronouncement in *Stoner* the circuit courts have reached conflicting results in attempting to determine when a third party can consent to a search which is directed at a criminal suspect. *Compare Niro* v. *United States*, 388 F. 2d 535 (C.A.1); *United States ex rel. Reeves* v. *Warden*, 346 F. 2d 915 (C.A.4); *Holzhey* v. *United States*, 223 F. 2d 823 (C.A.5); *United States* v. *White*, 405 F. 2d 838 (C.A.7), cert. granted, 394 U.S. 957, case restored for reargument 396 U.S. 1035, *with* the decision below and *United States* v. *Botsch*, 364 F. 2d 542 (C.A. 2) cert. denied, 386 U.S. 937. See also *State* v. *Evans*, 45 Hawaii 622, 372 P. 2d 865; *Hinchcliff* v. *Clark*, 371 F. 2d 697 (C.A. 6) cert. denied, 387 U.S. 941; *Lord* v. *Kelley*, 223 F. Supp. 684 (D. Mass.) appeal dismissed, 331 F. 2d 742 (C.A. 1) cert. denied, 379 U.S. 961; *United States* v. *Ruffner*, 51 F. 2d 579 (D. Md.) *United States* v. *Lagow*, 66 F. Supp. 738 (S. D. N.Y.), affirmed, 159 F. 2d 245 (C.A. 2), cert. denied, 331 U.S. 59.

The existing conflict is most readily found in contrasting the decision below with several cases presenting closely analogous factual situations. Here petitioner's employee was held to have waived petitioner's Fourth Amendment right to be secure in his "papers and effects" when the employee allegedly consented to the search of a box containing petitioner's records which was stored in the employee's home. This result is in direct conflict with the Fifth Circuit's decision in *Holzhey* v. *United States*, *supra*, where it was held that a man and woman who owned a house could not consent to a search of a cabinet in their home which belonged to the woman's mother. Similarly, in *United States ex rel. Reeves* v. *Warden*, *supra*, the Fourth Circuit held that a mother could not consent to the search

of a bureau set aside for the exclusive use of her son. See also *Simmons* v. *United States*, 390 U.S. 377, 391.

The existence of a conflict among the circuits on the question of third party consent has been noted by both federal and state courts. See *Anderson* v. *United States*, 399 F. 2d 753 (C.A. 10); *Commonwealth* v. *Wright*, 411 Pa. 81, 190 A. 2d 709. At least one writer has noted, "It is essential for the Supreme Court to make a prompt and final determination of this issue." Bender, *Third Party Consent to Search and Seizure: A Request for Re-evaluation*, 4 Crim. L. Bull. 343 (1968).

The Court presently has before it the issue of third party consent to the overhearing of a conversation by means of electronic surveillance. *United States* v. *White*, restored for argument 396 U.S. 1035. It would seem appropriate, therefore, for the Court to grant the petition for certiorari in this case and set the matter down for argument with *White* so that it might also consider the analogous problems of third party consent to the search and seizure of physical objects that is presented here.

II.

In *Amos* v. *United States*, 255 U.S. 313 and *Johnson* v. *United States*, 333 U.S. 10, the Court established the principle that a search without a warrant could not be sustained on the basis of "consent" when the evidence showed only that there had been a submission to the authority of law enforcement officers. In *Bumper* v. *North Carolina*, 391 U.S. 543, 548-549, the Court stated:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search he has the burden of proving that the consent was in fact freely and voluntarily given".

In direct conflict with these pronouncements the court below found that Kline, who had asserted his Fifth Amendment privilege in response to questioning by the Internal Revenue agents and who was then accompanied to his house by two armed agents, voluntarily consented to the agents' search and seizure of a box of records stored there by his employer.

Here again, the circuit courts have reached clearly conflicting results in determining when a consent to search is truly voluntary and when it represents no more than a submission to authority. *Compare* the decision below and *Gorman* v. *United States*, 380 F. 2d 158 (C.A. 1); *United States* v. *Jordan*, 399 F. 2d 610 (C.A. 2) cert. denied, 393 U.S. 1005; *United States* v. *Vickers*, 387 F. 2d 703 (C.A. 4); *United States* v. *Ziemer*, 291 F. 2d 100 (C.A. 7) cert. denied, 368 U.S. 877; *Drummond* v. *United States*, 350 F. 2d 983 (C.A. 8) cert. denied, 384 U.S. 944, *with United States* v. *Marrese*, 336 F. 2d 501 (C.A. 3); *Pekar* v. *United States*, 315 F. 2d 319 (C.A. 5); *Rosenthal* v. *United States*, 389 F. 2d 514 (C.A. 6); *Weed* v. *United States*, 340 F. 2d 827 (C.A. 10); *Judd* v. *United States*, 190 F. 2d 649 (C.A.D.C.).

Since the question of the validity of consent searches is one that has arisen often in the past and, in light of *Chimel*, will no doubt arise with greater frequency in the future, the Court should grant the petition in this case to resolve the existing conflict among the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN S. MARTIN, JR.
Attorney for Petitioner

APPENDIX

Opinion of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 24,585

ALBERT MENGARELLI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Nevada

Filed: May 12, 1970

Before: HAMLEY and WRIGHT, Circuit Judges, and SMITH,* District Judge

SMITH, District Judge

Appellant, who with his partner Richards, operated the Rendezvous Race Book in Las Vegas, Nevada, was convicted of a conspiracy[1] to evade or defeat the federal excise taxes imposed upon wagers.[2]

* The Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.

1. 18 U.S.C. §371.
2. 26 U.S.C. §4401 et seq.

Appellant contends that his Fifth Amendment rights were violated under the doctrines of *Grosso* v. *United States*, 390 U. S. 62 (1968) and *Marchetti* v. *United States*, 390 U. S. 39 (1968). These cases hold no more than that under the circumstances of them a person who properly invokes his Fifth Amendment rights may not be criminally prosecuted for failing to provide the information or to pay the tax required by the wagering tax statutes. Appellant did not rely on his Fifth Amendment rights. Rather he engaged in a calculated course of deceit which if successful would have enabled him to avoid any of the problems associated with a claim of privilege. One who engages in this form of self help does not properly invoke constitutional protection.

In *Dennis* v. *United States*, 384 U. S. 855, 867 (1966) the Supreme Court announced the rule that "a claim for unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit." *Bryson* v. *United States*, 36 U. S. L. W. 4011 (U. S. Dec. 8, 1969), reaffirmed *Dennis* and *United States* v. *Knox*, 38 U.S.L.W. 4016 (U. S. Dec. 8, 1969) applied the rule to the assertion of a claim of privilege under the Fifth Amendment in a case[3] involving false information given in connection with the wagering tax statutes. We are unable to distinguish *United States* v. *Knox*, *supra*, on the ground that *Knox* dealt with Section 18 U.S.C. §1001 forbidding the making of false statements to agencies of the United States, while this case deals with conspiring to defeat a tax. In neither case is the prosecution based on a failure to furnish information. Without some element of deceit there is no crime in either case but once the ele-

3. 18 U.S.C. §1001.

ment of deceit appears then the fact that the government ought not to have asked the question or required the act is not a defense (*Bryson* v. *United States, supra*) whatever the form of the statute forbidding the deceit.

In a free swinging and loosely aimed argument appellant urges that the evidence was insufficient to warrant a conviction. With this we do not agree. The evidence was sufficient to show without dispute that:

The Rendezvous Race Book accepted bets on horse races and sporting events. Bets were made in two ways, one in which the patron paid the wagering tax and the other in which he did not. In those cases where the tax was paid the patron would orally place the bet with a clerk who would collect the amount of the bet plus the ten per cent tax. The clerk would than write the selection and the amount of the bet on a ticket, machine stamp it, with the date, time and a number and issue a duplicate to the patron. Some of the regular patrons who did not pay the tax were permitted to write the information as to their bets on plain white tickets. These tickets with cash in the amount of the bet only would be given to the clerk who did not put the information on the printed tickets and who did not issue to the customer any receipt or duplicate of any kind. A substantial[4] part of the business of the Rendezous Race

4. Appellant urges that it was not shown that any substantial amount of tax was evaded. From observations conducted by treasury agents over a period of many months it appeared that a substantial portion of the business of the Book was done on the white slips. When the records of the Book were seized white slips for but one period of seven days in February, 1966, were found. The wagers shown on them totaled $70,762.00 as against total wagers of $84,829.00 for that period. The Government could not claim that the tax had been evaded on the $70,762.00 because tax returns for February, 1966 filed after the defendants know of the investigation, disclosed the totals on both the white and printed slips. The volume of bets shown on these white slips (the only ones seized) did tend to confirm the testimony of the government agents that the white slip bets were substantial.

Book was done on the white slips and it is clear from the evidence not only that the patron did not pay the tax on the white slip wagers but that the Book itself did not. The tax returns filed (except for the month of February, 1966) disclosed wagers in almost the exact amount reflected on the printed tickets. The evidence leaves no doubt but that the Rendezvous Race Book did evade the tax on a substantial portion of its business and was operated in a manner calculated to accomplish that purpose.

Appellant and his partner were in personal charge of the operation. They could not avoid knowing what was being done by their customers and employees with the white slips and they personally sorted and otherwise dealt with them. Richards generally signed most of the tax returns but on at least two occasions appellant signed them. There was no proof of a specific written or oral agreement to evade the law, but from what was done, coupled with the partner's proximity to the business it could be fairly inferred that the partners had deliberately organized their operations so that by means of what they and the employees did the white slip scheme was used to conceal from the government substantial numbers of bets on which no tax was paid. No more was needed to prove the conspiracy and the overt acts alleged in furtherance of it.

Exhibit No. 14, a box of the printed Rendezvous Race Book slips, was introduced in evidence over appellant's objection that the exhibit had been illegally seized. In February, 1966, the agents of the Internal Revenue Service executed a search warrant describing the premises of the Rendezvous Race Sports Book. They interviewed one Harold Kline, a cashier, and from him learned that he had some of the records in his home. The officers had sidearms

and did question Kline who refused to answer on Fifth Amendment grounds. Kline accompanied the officers to his home and turned the records over to the agents. Despite an order made on May 1, 1968, directing that any pre-trial motions be made by June 28, 1968, it was not until the trial, which commenced in February, 1969, that the attention of the court was called to the claim of illegal search and seizure. The Court admitted the evidence, subject to a post-conviction motion to suppress.

At the hearing of the post-trial motion to suppress, appellant produced no evidence and relied upon the trial record. The United States produced evidence bearing upon appellant's pre-trial knowledge of the Government's possession of Exhibit 14. The trial court found that the motion to suppress was not timely. Without comment as to the timeliness of the motion to suppress we affirm the Court's finding that Kline did have authority and that the records were not secured by an unreasonable search and seizure.

Apart from the fact that Kline was a cashier and did have the records, there is no evidence of his authority. Appellant in his motion to suppress asserted Kline's lack of authority but made no effort to produce evidence in support of that assertion. Exhibit 14 consisted of records which appellant was required to keep and have available for inspection under Nevada law.[5] They were not records which disclosed any illegal activity. These were the records which in any sort of an audit or inspection the Rendezvous Race Book would have produced to prove compliance with state

5. Regulation 5020(3) Nevada Gaming Commission adopted pursuant to specific statutory authority. N.R.S. §463.157).

and federal law.[6] Under these circumstances we believe that the trial court was justified in inferring Kline's authority to deliver Exhibit 14 to the Government.

If, however, the inference is impermissible and the Government failed to sustain its burden of proving a valid consent,[7] still the records were not secured by reason of an unreasonable search and seizure. The Constitution condemns only unreasonable searches. It was said in *United States* v. *Rabinowitz*, 339 U.S. 56 (1950) that what is unreasonable is not determined by any fixed formula, and although the authority of *Rabinowitz* is diminished by *Chimel* v. *California*, 395 U. S. 752 (1969), the rule still seems to be that the reasonableness of a search depends upon the facts and circumstances—the total atmosphere of the case—viewed in the light of established Fourth Amendment principles. There can be no question but that probable cause did exist for the search. No attack was made upon the validity of the warrant and it must be presumed that a magistrate had an opportunity to appraise that cause. On the authority of the warrant the internal revenue agents had lawful authority to seize the records at the Rendezvous Race Book. By reason of some unexplained course of dealing between the appellant and his employees the business records which would normally be expected to be at the place of business were not there but were in Kline's home. Whatever Kline's authority may have been, if he had authority to take the records he most certainly had authority to bring them back. Had he been requested to bring the records to the Book and had they

6. The regulation required Book to collect the federal tax from the player and maintain a record showing such collection.

7. See Bumper v. North Carolina, 391 U.S. 543 (1968).

been seized there, then the seizure would have occurred under the protective umbrella of the warrant. The officers did not invade Kline's home nor did they compel the delivery of the records. If the officers were at fault, the fault was in their failure to discern a difference (if there was a difference) between the authority of Kline to deliver the records to the Book where they might have been seized, rather than to turn them over at his home. In the atmosphere of the whole case we cannot believe that this failure rendered the taking of the records unreasonable.

We bear in mind that the rule which excludes evidence unconstitutionally secured has a prophylactic purpose—to discourage public officers from flouting the Constitution. In *Elkins* v. *United States*, 364 U. S. 206, 217 (1960) the Supreme Court stated the basic postulate of the exclusionary rule:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

We think it proper in determining what is reasonable in the atmosphere of a given case to determine whether the conduct of an officer is such that some sanction should be imposed on account of what that officer has done. Where, as here, the officer's wrong was at most questionable misappraisal of an agent's authority, we think that the sanction of exclusion should not be imposed.

The case differs from the cases where the consent was given by a landlord or hotel clerk.[8] In those cases the basic possession of the place searched and the thing seized

8. See *Chapman* v. *United States*, 365 U. S. 610 (1961); *Stoner* v. *California*, 376 U.S. 483 (1964). *Lustig* v. *United States*, 338 U.S. 74 (1949); *United States* v. *Jeffers*, 342 U.S. 48 (1951).

was not in the landlord or clerk; there was no entrusting of the thing seized to the landlord or the clerk; an officer would have no reason to believe that the landlord or clerk had any authority to deliver the tenant's or guest's personal property to the Government.

We have considered the other contentions made by appellant and we find no merit in them. We think it would serve no useful purpose to set out obviously untenable contentions and then dispose of them by elucidating the obvious.

Appellant was properly tried and convicted and the judgment is affirmed.

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Circuit Judge

.....
Circuit Judge

.....
District Judge

Order Denying Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 24,585

UNITED STATES OF AMERICA,

Appellee,

v.

ALBERT MENGARELLI,

Appellant.

ORDER

Before:

HAMLEY and WRIGHT, Circuit Judges, and SMITH, District Judge*

The petition for rehearing is denied.

Dated: July 9, 1970

Filed: July 9, 1970

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United States Circuit Judges

.....

United States District Judge

* The Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.

No. 963

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

ALBERT MENGARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 642

ALBERT MENGARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of conspiracy to evade a substantial part of the federal excise tax imposed upon wagers, in connection with the Rendezvous Space and Sports Book which he and his partner, Richards, operated. The court of appeals affirmed (Pet. 1a-8a).[1]

[1] The court of appeals concluded that the "evidence leaves no doubt but that the Rendezvous Race Book did evade the tax on a substantial portion of its business and was operated

As appears from the opinion below, the scheme proved was that the bookmaking operation would accept bets in two forms. Those from casual customers would be by printed ticket with the 10% tax paid by the customers. Regular customers would write out their bets on white slips of paper and would not pay the tax. The tax returns for the period from April 1965 through January 1966, closely corresponded to the printed tickets. Following extensive investigation by treasury agents, search warrants were obtained for various locations to seize the records of the business. The warrants were served on February 19, 1966. Among other things, the government obtained not only printed tickets, but also white slips for the period February 12-18, 1966 (Pet. 4). Since these records were seized before the tax return was due, the failure to pay the amount due on wagers for February was not charged in the indictment, but the government did show that the white slips for the week of February 12-18 totaled more than $70,000, whereas the printed slips totaled a little more than $14,000.

The petition challenges only the admissibility of Exhibit 14, a box of printed tickets for the week of February 12-18 which were given to federal agents by Harold Kline, a cashier of petitioner's business establishment. (Tr. 231-233). Petitioner made no motion to suppress before trial but did so after an agent

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[Footnote continued.]

in a manner calculated to accomplish that purpose." (Pet. 4a). Neither this conclusion nor the sufficiency of the evidence is challenged by petitioner.

testified that, at the time the search warrant was executed, Mr. Kline told him that certain records of the business were at his home (Tr. 247)[2] and that the agent accompanied Kline to his home where the latter gave the agent the records (Tr. 228-229, 231).

The trial court admitted the records, subject to a post-trial motion to suppress at which petitioner could show that the issue could not have been timely raised (Tr. 309). At the hearing on that motion, the defense declined to offer any additional evidence but rested on the record at trial (Tr. 635). The government introduced evidence showing that the defense knew of the government's possession of these records long before trial (Tr. 638-640, 645-649). The court denied the motion, finding it inconceivable that petitioner had not been aware of how the records were obtained, that "no evidence ha[d] been presented to show to the contrary" and that, accordingly, the motion was "not timely" (Tr. 652). The court also found that Mr. Kline had possession of the records and authority to consent to seizure of the records which belonged to the business. Noting that there was a warrant for the seizure of the business premises, the court held it was "not an unreasonable extension to permit a search of nearby premises where the records were temporarily stored." (*Ibid*).

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[2] The agent said that Kline had refused to answer "certain questions" on the ground that the answers would incriminate him (Tr. 247). Two agents went to Kline's house. When Kline indicated that his wife would be upset if she saw them, he was told that he could tell her that they were auditors who were picking up Rendezvous records (Tr. 249-250).

The court of appeals affirmed without considering the timeliness of the motion to suppress, finding both that Kline had authority to consent and that the seizure under the authority of the warrant was reasonable in the circumstances. The court pointed out in this connection that if Kline had authority to take the records he had authority to bring them back to the premises where they would have been seized under the warrant (Pet. 6a).

It is thus evident that this case does not present the general question raised in the petition of the authority of a third party to consent to a search (Pet. 6). The decision below rests on the particular circumstances that business records which the law required petitioner to keep[3] and which were properly subject to seizure under a valid warrant, happened, when the warrant was executed, to be at the home of petitioner's cashier who turned them over to the agent.

A long-standing principle emerging from the decisions of this Court is that the "specific content and incidents of [the right to be secure against unreasonable searches and seizures] must be shaped by the context in which it is asserted. For 'what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures'" *Terry* v. *Ohio*, 392 U.S. 1, 9; *Elkins* v. *United States*, 364 U.S. 206, 222. That context underscores the reasonableness of the official activity in this case. Kline's authority to

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[3] As the court below noted, these records were required under Nevada law, and were to be available for inspection by state and federal authorities (Pet. 5a-6a).

consent was apparent from the fact that the records had been entrusted to his care. Significantly petitioner, although given every opportunity to do so, failed to present any evidence to show either Kline's lack of authority or lack of consent. At all events, the opinion below correctly points out (Pet. 6a-7a) that in the circumstances here the taking of the records from Kline, irrespective of his authority, was as to petitioner's rights no different from the taking of other records of his business under authority of the warrant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1970.

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ALBERT MENGARELLI,

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UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

JOHN S. MARTIN, JR.
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IN THE

Supreme Court of the United States

October Term, 1970

No. 642

ALBERT MENGARELLI,

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UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

This brief is submitted in reply to the Memorandum for the United States in Opposition submitted by the Solicitor General.

The Government contends that the issues raised in the Petition, involving an employee's power to waive petitioner's Fourth Amendment rights and the voluntariness of that waiver, are not in fact presented. The arguments advanced to support this contention implicitly require the acceptance of one of the following erroneous legal theories:

(1) that a search may be justified by what it uncovers; (2) that where consent is relied on to justify a search, the defendant has the burden of disproving that a valid consent was given; and (3) that once a search warrant is obtained, the agents may search premises other than that described in the warrant so long as they are looking for the type of items described in the warrant.

The Solicitor General argues that because the box belonging to petitioner was found to contain business records of his gambling establishment, the search and seizure of that box without a warrant was permissible (Memorandum in Opposition, p. 4). But, until the agents invaded petitioner's privacy by opening the box and inspecting its contents, they could not be positive that it did not contain his personal papers. The information which the agents possessed might have been sufficient to justify a magistrate to issue a warrant authorizing the search and seizure of the box. But, the fact that the agents' suspicion was proven correct when the box was opened cannot validate the search and seizure without a warrant. "The idea that a search can be justified by what it turns up was long ago rejected." *Bumper v. North Carolina*, 391 U.S. 543, 548.

In urging that the employee could validly consent to the search in question, the Solicitor General states:

> "Significantly petitioner, although given every opportunity to do so, failed to present any evidence to show either Kline's lack of authority or lack of consent." (Memorandum in Opposition, p. 5)

It is true that, at the hearing on the motion to suppress, defense counsel did not offer any evidence on the question of Kline's authority or lack of consent. Instead, defense

counsel rested on the testimony of the agent (1) that at the time he seized the box of records he knew that it belonged to petitioner and that Kline had no proprietary interest in the box; and (2) that Kline had refused on Fifth Amendment grounds to answer question of the agents shortly before two armed agents accompanied Kline to his house and seized the records. These facts were sufficient to show that there had been a search and seizure, without a warrant, of a box which the agents knew belonged to petitioner, not his employee, and that there was serious doubt as to the voluntariness of the employee's consent to the search. If the Government wished to rely on the exception to the warrant requirement based on a valid consent to search, the prosecution had the burden of introducing evidence to show the authority of Kline to consent to the search and the voluntariness of his consent. See *Bumper* v. *North Carolina*, *supra*; *United States* v. *Jeffers*, 342 U.S. 48. Thus, if there was additional evidence available that was relevant on these issues, the Government, and not the defendant, had the burden of offering such evidence.

Finally, the Government argues that the taking of the records from Kline's house, irrespective of his authority, was no different from the seizure of the records from petitioner's business establishment under the authority of the warrant which the agents had obtained (Memorandum in Opposition, p. 5). This argument, however, flies in the face of the accepted principle that

> "The authority to search is limited to the place described in the warrant and does not include additional or different places." *Keiningham* v. *United States*, 287 F.2d 126, 129 (C.A.D.C.); *United States* v. *Zorluck*, 174 F.Supp. 385, 390 (S.D.N.Y.)

In sum, eachr of the arguments advanced by the Solicitor General to justify the search in question on some basis other than consent is contrary to accepted principles of search and seizure law. Thus, the search of the box and the seizure of petitioner's records can only be sustained by a finding that the employee Kline had the power to waive petitioner's Fourt Amendment rights and that his consent to the search was voluntary. In the Petition it was established that the question of a third party's power to waive the Fourth Amendment rights of a criminal defendant and the question of the standards to be applied in determining the voluntariness of a consent to search are questions of importance to the administration of criminal justice on which there is a conflict among the circuits. The Solicitor General does not dispute this. Since those questions are presented here, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN S. MARTIN, JR.
Attorney for Petitioner

SUPREME COURT, U.S.
FILED
DEC 17 1970
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IN THE

Supreme Court of the United States

October Term, 1970

No. 642

ALBERT MENGARELLI,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

Albert Mengarelli petitions the Court for a rehearing of the decision denying his petition for a writ of certiorari which was entered on November 23, 1970.

I

The petition for a writ of certiorari herein presented the question whether petitioner's employee could validly consent to the search and seizure of the contents of a box belonging to petitioner which was stored in the employee's home. This question, which involves a third party's abil-

ity to waive the fourth amendment rights of a criminal defendant by consenting to the search and seizure of the defendant's property, is closely analogous to the issues presented in *United States* v. *White*, No. 13, this Term, reargued October 20, 1970, which has not yet been decided by this Court.

United States v. *White*, *supra*, presents the question whether an informant can waive the fourth amendment rights of a criminal defendant by permitting government agents to overhear his conversation with the defendant by means of an electronic listening device. The Seventh Circuit's opinion in *White* clearly rejected the argument that a third party could waive the fourth amendment rights of a criminal defendant, stating:

> "* * * [the fourth] amendment's search and seizure protection is lost to a person when his actions as a matter of law can be said to constitute a waiver of his right. Since the fourth amendment protects a speaker's right to privacy, this right would be illusory if it could be waived by other individuals." 405 F2d 838 at 845.

The government's reliance on the informant's consent as validating the search and seizure in *White* was stressed by Assistant Attorney General Wilson in his argument before this Court. See 8 Cr. L. Rep. 4034.

It is apparent from the foregoing that this Court's decision in *White* will necessarily involve a ruling on the power of a third party to waive the fourth amendment rights of a criminal defendant. In view of the close analogy between the issues presented here and those in *White*,

petitioner respectfully submits that final disposition of this case should be held in abeyance pending a decision in *White*. If the Court affirms the decision of the Seventh Circuit in *White* that a third party cannot waive the fourth amendment rights of a criminal defendant, it would seem appropriate for the Court to summarily reverse the decision in this case. If, on the other hand, this Court rejects the Seventh Circuit's decision in *White* and rules that a third party can waive the fourth amendment rights of a criminal defendant by consenting to the overhearing of a conversation in which he is a participant, it may be appropriate for the Court to grant certiorari in this case to consider whether different standards should be applied in assessing the constitutional validity of a third party's consent to the search and seizure of physical objects which are the exclusive property of a criminal defendant.

Petitioner notes also that the question of a third party's consent to the search and seizure of a defendant's property is one which continues to arise and, thus, should be considered by this Court. See *State* v. *Flowers*, Mich. Ct. App. 8/28/70, 8 Cr. L. Rep. 2031 (8/28/70).

II

The petition for a writ of certiorari raised only questions relating to validity of the search and seizure. Further reflection suggests, however, that this case raises another substantial ground warranting consideration by this Court.

Petitioner, a person licensed to engage in the business of accepting wagers in the State of Nevada, was convicted

of conspiring to evade the 10% Federal excise tax on wagers. In *Grosso* v. *United States*, 390 U.S. 62, this Court held that a person who engaged in the business of accepting wagers in a state where that business was illegal could not be convicted for failing to pay the excise tax or for conspiring to evade the payment of that tax. See also *Marchetti* v. *United States*, 390 U.S. 39. The practical effect of the *Grosso* and *Marchetti* decisions is to make the federal law relating to the taxation of wagers inoperative in every state but Nevada, where petitioner carries on his business. This case thus raises the question whether, in light of *Grosso* and *Marchetti*, the enforcement of the wagering tax law in Nevada only violates the requirement of Article I, Section 8, of the Constitution that "all Duties, Imposts and Excises shall be uniform throughout the United States."

As this Court stated in *Fernandez* v. *Wiener*, 326 U.S. 340, 359:

> "It has long been settled that within the meaning of the uniformity requirement a 'tax is uniform when it operates with the same force and effect in every place where the subject of it is found.' "

See also *Patton* v. *Brady*, 184 U.S. 608; *Head Money Cases*, 112 U.S. 580.

While there can be no doubt that gambling may be found in every state,* the practical result of the *Grosso* and *Marchetti* decisions is that the gambling tax law will

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* The fact that gambling exists in every state distinguishes this case from those cases such as the *Head Money Cases*, 112 U.S. 580 which have held that Article I, Section 8 is not violated simply because the subject of the tax is not found in every state. See also *Poe* v. *Seaborn*, 282 U.S. 101.

be enforced only in Nevada. Thus, it appears that the decisions in *Grosso* and *Marchetti* have so restricted the enforcement of the gambling tax laws, that the application of these laws to a Nevada gambler, such as petitioner, would violate the uniformity requirements of Article I, Section 8 of the Constitution.

The above discussion suggests a further question concerning the continued validity on any portion of the gambling tax act in the light of *Grosso* and *Marchetti*. Those decisions have limited the application of that act to an extent that Congress could never have anticipated. Whereas Congress enacted a statute imposing a tax that was to be collected in every state, the *Grosso* and *Marchetti* decisions have made enforcement of that statute possible in only one state. Thus the question is presented whether the statute as a whole should fall because of the substantial frustration of the original Congressional intent. See *The Employers Liability Cases*, 307 U.S. 463; *Williams* v. *Standard Oil*, 278 U.S. 235.

In light of the foregoing, petitioner respectfully requests the Court to vacate its order denying certiorari and to grant the petition.

Respectfully submitted,

JOHN S. MARTIN, JR.
Attorney for Petitioner

Certificate of Counsel

I hereby certify pursuant to Rule 58 of the Rules of this Court that the above petition for rehearing is submitted in good faith and not for delay and is restricted to the grounds set forth in paragraph 2 of said Rule.

/s/ JOHN S. MARTIN, JR.

JOHN S. MARTIN, JR.